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No. 89-266

In The

Supreme Court of the United States

October Term 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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Pursuant to Rule 36 (.1) of the Supreme Court Rules, Mountain States Legal Foundation (MSLF) respectfully requests that this Court grant it leave to file the attached brief *amicus curiae* in support of the Petition For Writ of Certiorari to the Montana Supreme Court filed by the Petitioner, Portland General Electric Company. Consent for the filing of this brief has been obtained from counsel for the petitioner, Portland General Electric Company, however, permission from counsel for the Montana Department of Revenue, was requested by telephone and denied.

In support of this motion, MSLF states as follows:

1. MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, and the free enterprise system. MSLF takes great interest in questions of law having national scope and especially those that have a direct impact in the Rocky Mountain region, including the State of Oregon where the incidence of the challenged tax will rest.

2. Many MSLF members are consumers of the electricity which is transmitted by the Bonneville Power Administration over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), created by an Act of Congress.[1] Petitioner herein, Portland General Electric Company (PGE), is one of five investor-owned utilities that owns generating facilities in Southeastern Montana, at Colstrip. PGE has entered into a "wheeling" agreement with BPA. PGE's customers all reside in the State of Oregon and have no representatives in the halls of the Montana Legislature, nor can they participate in the elections for Montana's District Court Judges and Supreme Court Justices. In *American Oil Co. v. Neill*, 380 U.S. 451, 455 (1965), this Court held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather

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[1] 16 U.S.C. § 838b.

> than form. (citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax.

The tax now under scrutiny will ultimately be borne by the customers of PGE, all of whom reside in the State of Oregon. Because those customers have no representation in the Montana Legislature, this amounts to "taxation without representation".

3. The State of Montana has imposed a beneficial-use tax on PGE for transmission lines constructed, owned, operated and used exclusively by a federal authority, BPA, to provide service pursuant to Congressional Authority. The incidence of the tax falls on residents of another state, Oregon, and has far reaching ramifications for the residents of every state who face the possibility that one state will tax federal property used in interstate commerce which has the effect of passing the tax to residents of those other states. MSLF seeks to present to this Court fundamental policy considerations regarding the adverse impact the Montana Statute and the decision of the Montana Supreme Court have on the residents of the State of Oregon.

4. The residents of Oregon who will suffer the adverse impact of the illegal imposition of the tax have not had an opportunity to be heard in the previous proceedings and this Court is the only tribunal which will have an opportunity to review this matter on behalf of the residents of Oregon.

5. There is a Substantive Due Process problem with the tax as applied by the Department of Revenue for the

State of Montana and allowed by the Montana Supreme Court. The taxation of federally constructed, owned, operated and used facilities, such as in the instant case, is directly contrary to the holding of this Court in *M'Culloch v. The State of Maryland, et al.*, 17 U.S. (4 Wheat.) 316 (1819). In *M'Culloch v. The State of Maryland, et al.*, this court held:

> If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights. . . . (*Id.* at 432)

The "wheeling" contract between PGE and BPA requires BPA to provide electrical power to PGE over the BPA's facilities. The BPA uses the facilities to fulfill its contract with PGE. PGE's contract for BPA's services cannot give rise to a "beneficial use" tax anymore than an agreement by a citizen of Oregon for the services of the U.S. Postal service to send a package to a resident in Montana can give rise to a beneficial-use tax. The party using the mail service contracts with the U.S. Postal Service to deliver the package and the Postal service uses its own facilities and methods to fulfill the contract. There can be no tax on the agreement for Postal services by the postal patron and in the same sense there can be no tax on PGE's contract for BPA's services.

6. These considerations, while directly applicable to the instant case, transcend the specific interests of the existing parties, and thus may not be adequately addressed by these parties.

For the foregoing reasons, MSLF respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

DATED this 8th day of September, 1989

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of Portland General Electric Company, the Petitioner for certiorari.

INTEREST OF AMICUS CURIAE

The Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. MSLF

takes great interest in questions of law having national scope and especially those that have a direct impact in the Rocky Mountain region, including the State of Oregon where the incidence of the challenged tax will rest.

Many of the MSLF members are consumers of electricity transmitted by the Bonneville Power Administration (BPA) over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), which system was created by an Act of Congress.[1] The grid of transmission lines is owned, operated, used, and constructed exclusively by BPA, a federal authority. Portland General Electric Company (PGE) has a "wheeling" contract with BPA for the transmission of firm power to PGE's facility in Oregon. As a result of this contract, the State of Montana has imposed a tax on PGE for the property used by BPA to provide contractual services to PGE. All of the customers of PGE are located in the State of Oregon and have no "political check against the abuse of the power to tax" by the Montana Legislature. *United States v. County of Fresno*, 429 U.S. 452, 458. PGE is taking the position that the taxes are unconstitutional since the citizens of the State of Oregon have not been represented in the political decision to levy a tax upon them. MSLF seeks to enter this action on behalf of the citizens of Oregon and requests that this Honorable Court review the tax and the decision by the Montana Supreme Court.

MSLF is further interested in this matter because the State of Montana is attempting to tax facilities which were constructed by a federal authority and are now

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[1] 16 U.S.C. § 838b.

owned, operated and used exclusively by that same federal authority. This Honorable Court has held that a state may not tax federal facilities which are owned, operated and used exclusively by the federal government. *See M'Culloch v. The State of Maryland, et al.*, 17 U.S. (4 Wheat.) 316 (1819). By passing this particular statute, the State of Montana seeks to tax federal facilities contrary to the public policy sought to be achieved by the creation of FCRTS and BPA. The tax has been upheld by the Montana Supreme Court despite the fact that it is in direct derogation of the *M'Culloch* decision.

STATEMENT OF THE CASE

Amicus Curiae adopts Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

I. OREGON RESIDENTS, UPON WHOM THE TAX RESTS, HAVE NO EFFECTIVE REPRESENTATION EXCEPT BEFORE THIS HONORABLE COURT

This country was founded on the principle that those who are governed must have a say in those who govern and the decisions they make. In other words, there must be representation in all aspects of government, particularly those decisions involving taxes since the power to tax is the power to destroy. The Declaration of Independence states:

> . . . governments are instituted among men, deriving their *just powers* from the *consent* of the governed. . . . (Emphasis supplied)

In setting forth the facts giving rise to the Declaration of Independence, the drafters stated:

> He has refused to pass others laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature – a right inestimable to them and formidable to tyrants only. . . .

The drafters were particularly upset with the King "for imposing taxes on us without our consent. . . ."

The framers of the Declaration of Independence recognized the critical importance of representation by those governed. They were particularly concerned about the imposition of taxes without proper representation. The principles espoused in the Declaration of Independence are protected by the United States Constitution. The Constitution provides for equal protection under the laws, including representation.

In the case at bar, the State of Montana seeks to impose beneficial use taxes on the residents of Oregon by imposing said tax on the Petitioner, Portland General Electric Company (PGE), because of the alleged "use" by PGE of transmission facilities constructed, owned, operated and used exclusively by a federal authority, Bonneville Power Administration (BPA).

Although the tax is ostensibly imposed upon PGE, the tax ultimately falls on the consumers who are all residents of the State of Oregon. This Honorable Court in *American Oil Co. v. Neill*, 380 U.S. 451, 455, held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. (Citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find the operating incidence of the tax.

Because those Oregon consumers have no representation in the Montana Legislature nor do they have the right to participate in the elections for Montana's District Court Judges and Supreme Court Justices, this amounts to "taxation without representation."

The issue of legislation without representation has arisen in the context of the Indian tribes and tribal government. Most recently this Honorable Court discussed that issue in *Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, ___ U.S. ___, 87-1697, 57 U.S.L.W. 4999. Justice Stevens, in discussing the authority of the Indian Tribe to determine the character of land owned predominantly by non-Indians, stated:

> Moreover, it is unlikely that Congress intended to give the tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent eighty percent of the population yet *lack a voice* in tribal governance. (Emphasis supplied)

The framers of the Constitution and Declaration of Independence recognized the importance of protecting the "voice" of the governed in legislation. To paraphrase Justice Stevens, it is unlikely that the framers of the Constitution intended that Montana have the right to tax

Oregon residents when they "lack a voice in [Montana] governance."

The decision of the Montana Supreme Court and the tax in question are particularly onerous because there is no "political check against abuse of the power to tax" because the persons upon whom this tax falls have no right or voice in the governmental process. *United States v. County of Fresno*, 429 U.S. 452, 458-459 (1977).

In *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, this Honorable Court held:

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

All of the facilities owned, operated and used by PGE in the State of Montana are taxed as are the facilities of any other private individual or corporation. But in this particular case, the State of Montana attempts to impose a tax on transmission facilities that are owned, operated and exclusively used by the federal government, namely the BPA. Those facilities are not owned or used by PGE. There is no protection, opportunity or benefit given to PGE by the State of Montana for which the tax can be exacted. In other words, there is no nexus or relationship between the tax imposed by the State of Montana and any opportunity, benefit or protection provided to PGE by the State of Montana. Because there is no connection between the protection provided, the State of Montana is in

essence taking the property of PGE without due process of law, which violates the Fourteenth Amendment.

The same argument would apply to the residents of the State of Oregon who are the consumers of the electricity. The State of Montana provides no protection, benefit or opportunity to the residents of the State of Oregon. The "protection, benefit and opportunity," if any, is provided only to BPA. As BPA is a federal facility, "protection, benefit or opportunity" is being provided by federal agencies. Because federal agencies provide the necessary "protection, benefit, or opportunity" to BPA, BPA creates no burden for the State of Montana which would give rise to the tax on BPA facilities. The State of Montana is attempting to take property of the residents of the State of Oregon without due process of law, which violates the Fourteenth Amendment of the United States Constitution.

Because there is "no political check to the abuse of the taxing power" (*County of Fresno*, 429 U.S. at 458) for residents of Oregon and there is no "protection, opportunities and benefits . . . for which [Montana] can ask return," the tax is unconstitutional. (*Wisconsin v. J.C. Penney Co.*, 311 U.S. at 444)

II. THE STATE OF MONTANA HAS NO AUTHORITY TO TAX FEDERAL FACILITIES LOCATED IN THE STATE OF MONTANA

The Montana Supreme Court in its decision affirming the lower court cited *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 127 (1906), wherein this Honorable Court stated:

> The expression "be[illegible]icial use" or "beneficial ownership or interes[illegible] property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

It cannot be argued that PGE is enjoying or using BPA's property. BPA has *exclusive* enjoyment and use of its property. This Honorable Court in *United States v. County of Fresno*, 429 U.S. 452, 462, stated:

> These cases make clear that a state may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being *used* by a private citizen or corporation and so long as it is the *possession or use by the private citizen that is being taxed.* (Emphasis supplied)

PGE *does not have* possession of or use of the BPA's facilities located in the State of Montana. Montana is trying to tax PGE for property it does not use. PGE has a contract with BPA which requires BPA – in accordance with the public policy enacted in federal statute – to use its facilities to provide power to PGE in Oregon. The power itself can come from any of a number of sources which are connected to the FCRTS. Therefore, the power may be from Washington, Oregon or any other source which is connected to FCRTS.

PGE's contract right referred to by the Montana Supreme Court to justify the imposition of the tax on PGE for BPA's property is no different than the contract right

every private citizen has in the facilities (trucks, buildings, etc.) of the U.S. Postal Service. An individual placing a letter or package in the U.S. mail makes a contract with the Postal Service that the letter will be delivered as addressed. The contract between the private individual and the U.S. Postal Service gives rise to court "enforceable" rights in the individual. If the reasoning of the Montana Supreme Court is extended to the point that the "*use*" made by a private individual of the U.S. Postal Service facilities gives rise to a "beneficial use" tax then all property of the U.S. Postal Service used to deliver the mail to each individual is subject to a comparable tax. This result is directly contrary to the decision of this Court in *M'Culloch v. The State of Maryland, et al.* In *M'Culloch,* this Honorable Court specifically held that postal facilities would not be subject to a tax even though the Postal Service uses its facilities to serve the "enforceable contract rights" of the individual.

CONCLUSION

The incidence of the tax imposed by the State of Montana falls upon the residents of the State of Oregon. Because they have no "voice" in the Montana Legislature, there is no "political check against the abuse of the power to tax" which the Constitution would guarantee under the Fourteenth Amendment. Without the constitutionally protected political check – votes – the only constitutional protection provided to the citizens of Oregon is review by this Honorable Court. The actions of the State of Montana are nothing more than "taxation with representation."

The State of Montana seeks to impose a tax on federal facilities which are neither possessed nor used by the Petitioner and the State of Montana does not provide the necessary protection, opportunity, or benefit to meet the test of whether the property is taken without due process of law. Accordingly, this Honorable Court should grant the Writ of Certiorari and reverse the ruling below.

Respectfully submitted,

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